In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1449

DIFCO LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12–20) is reported at 389 F. 2d 663. The Board's decision and order in the unfair labor practice case (Pet. App. 21–34) are reported at 154 NLRB 921; its decision in the related representation case is set forth at Pet. App. 35–46.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1968 (Pet. App. 12). The petition for a writ of certiorari was filed on May 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

309-023—68

QUESTION PRESENTED

Whether the Board correctly ruled that the petitioner was not entitled to an evidentiary hearing on its objections to a representation election because the objections did not raise any material issues of fact.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., *et seq.*), and of the Board's Rules and Regulations are set forth in the Appendix to the petition (pp. 47, 68–70).

STATEMENT

Petitioner Company manufactures biological and bacteriological material and supplies (Pet. App. 26; J.A. 16a, 71a, 77a).[1] Upon a petition filed by Local 7–389, International Union, Oil, Chemical and Atomic Workers International Union, AFL–CIO ("the Union") requesting certification as the bargaining agent for a unit of the Company's tissue culture laboratory employees (J.A. 41a–43a, 72a–73a), the Board's Regional Director conducted an election in the requested unit, in which 22 votes were cast for the Union, 2 against, and 19 ballots were challenged (Pet. App. 35; J.A. 56a). The Company filed four objections to the election (Pet. App. 36–37; J.A. 56a–58a, 52a–53a). After an administrative investigation, the Regional Director concluded that the objections were without merit.

[1] "J.A." refers to the portions of the record printed in the Joint Appendix to the briefs in the court below.

The first two objections alleged in substance that before and during the election there was confusion as to which employees were eligible to vote; that this was the fault of the Board and the Union; and that such confusion interfered with employee freedom of choice (Pet. App. 36–37; J.A. 56a–57a, 52a–54a). The Regional Director's investigation revealed that, on the day of the election, there was some confusion as to which employees were eligible to vote because the Company previously had listed 49 employees as included in the unit, whereas in fact the unit consisted of 29; and the Company had not furnished a corrected eligibility list until the morning of the election. The Director further found, however, that this confusion, which occurred at the desk of an office clerk about 20 yards away from, and out of sight of, the polling place, did not create any confusion at the polling place itself, nor deter any employee who wanted to vote from doing so. The employees moved from the clerk's desk to the polling place, where those who were not on the revised eligibility list were permitted to vote with those who were, but subject to challenge. (Pet. App. 39–43; J.A. 59a–63a.)[2]

The Company's third objection was that the Union and its representatives interfered with employee free choice by circulating a rumor on the day of the election that some or all of the unit employees would be

[2] With respect to these objections, as well as the third, discussed *infra*, the Company offered no evidence in support of its conclusionary allegations that free choice was affected, although it was afforded a full opportunity to do so in the Regional Director's investigation (Pet. App. 38; J.A. 58a).

discharged if the Union lost the election (Pet. App. 37; J.A. 63a, 54a). The Regional Director found, however, that the rumors were circulated by rank-and-file employees, that there was no evidence that the Union or its representatives were in any way responsible for the rumors, and that the rumors were directed at the four to six employees who were leading the Union campaign. He concluded that, in these circumstances, the rumors could "clearly be evaluated by the remaining employees as impossible of fruition without employer participation". (Pet. App. 44; J.A. 64a).[3]

The Company's fourth objection challenged the appropriateness of the unit in which the election was conducted (Pet. App. 37; J.A. 58a, 54a). The Regional Director overruled that objection on the ground that the Board had already considered and rejected that contention in denying the Company's earlier request for review of the Regional Director's direction of election (Pet. App. 45; J.A. 64a, 47a–48a).

The Regional Director accordingly declined to set aside the election, and certified the Union as the representative of the employees in the unit found to be appropriate (Pet. App. 45–46; J.A. 64a–65a). The Company filed a request for review of the Director's certification "for the reasons stated in the Employer's Objections to Conduct of Election." The only material attached to this request was a certificate of service. The Board denied the request "as it raise[d] no substantial issues warranting review." (J.A. 18a, 68a.)

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[3] See n. 2, *supra*.

Thereafter, the Company refused the Union's request to bargain, the Union filed unfair labor practice charges, and a complaint was issued alleging that such refusal violated Section 8(a)(5) and (1) of the Act (Pet. App. 22, 27–28; J.A. 13a, 17a–19a, 4a–10a). Upon consideration of the Company's response (J.A. 34a) to the General Counsel's Motion for Summary Judgment, the Trial Examiner found that there was no dispute as to the facts upon which the Regional Director had relied in overruling the Company's objections, and that the issues of law raised had already been decided in the representation proceeding (Pet. App. 25; J.A. 16a). Accordingly, the Examiner granted judgment on the pleadings, holding that the Company had violated Section 8(a)(5) and (1) by refusing to bargain (Pet. App. 29–30; J.A. 19a–20a). The Board affirmed the Examiner's decision and ordered the Company to bargain, on request, with the Union (Pet. 21–22, 30–32; J.A. 13a, 20a–23a). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 12–20).

ARGUMENT

The petition rests on the premise that the Company was denied a hearing on its objections to the representation election which raised substantial and material issues of fact.[4] However, the specific facts disclosed by the Regional Director's administrative investiga-

[4] The Board's Rules and Regulations provide for an evidentiary hearing where objections present "substantial and material factual issues" (29 C.F.R. 102.69(c); Pet. App. 68–70).

tion were not controverted by the Company either by affidavits attached to its objections or by witnesses or other evidence offered to the Director,[5] and therefore the only question really presented is the propriety of the Director's (and the Board's) conclusions based on the uncontroverted facts.[6] Such an issue, which turns on the inferences to be drawn from the facts of this particular case, does not warrant review by this Court. Moreover, as we now show, the Director's conclusions were reasonable.

Since the Director's investigation revealed no evidence of disorder at the polling place itself and that all employees desiring to vote were permitted to do so (*supra*, p. 3), and since the tally of ballots further showed that 24 of the approximately 29 eligible voters in the unit did in fact vote (Pet. App. 35; J.A. 56a), the Regional Director was fully justified in rejecting the Company's contention that the confusion over voter eligibility interfered with employee free choice. Similarly, in the light of the undisputed evidence showing that the discharge rumor originated among the employees, was directed at the four or six em-

[5] The burden is upon the party challenging the fairness of a representation election to come forward with "specific evidence of specific events from or about specific people" which would tend to support his objections. *National Labor Relations Board* v. *Douglas County Electric Membership Corp.*, 358 F. 2d 125, 130 (C.A. 5). See, also, *National Labor Relations Board* v. *Mattison Machine Works*, 365 U.S. 123, 124. Petitioner does not deny that it was afforded an opportunity to present evidence in support of its objections to the Regional Director.

[6] "If there is nothing to hear, then a hearing is a senseless and useless formality." *National Labor Relations Board* v. *Air Control Products*, 335 F. 2d 245, 249 (C.A. 5).

ployees active in the Union's campaign, and was in no way attributable to the Union (*supra*, p. 4), the Director was reasonable in concluding that the employees were capable of discounting it. Finally, since the Company's fourth objection merely challenged the unit determination on the same grounds which the Board had previously rejected (*supra*, p. 4), that objection, too, was properly overruled.[7]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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JUNE, 1968.

[7] Moreover, as the court below found (Pet. App. 18), the Board's finding that a unit of tissue culture laboratory employees was appropriate was supported by substantial evidence, and was neither arbitrary nor violative of any provision of the Act.

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